APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,749

INTERNATIONAL BROADCASTING CORPORATION, *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

KTBS, INC., *Intervenor.*

Appeal from a Decision and Order of the
Federal Communications Commission

Decided May 3, 1956

Mr. William J. Dempsey, with whom Messrs. William C. Koplovitz and Harry J. Ockershausen were on the brief, for appellant.

Mr. Edward W. Hautanen, Counsel, Federal Communications Commission, with whom Messrs. Warren E. Baker, General Counsel, Federal Communications Commission, J. Smith Henley and Richard A. Solomon, Assistant General Counsel, were on the brief, for appellee.

Mr. Charles Russell Rowell for intervenor. Messrs. Frank Roberson and Frank U. Fletcher also entered appearances for intervenor.

Before Bazelon, Fahy and Washington, Circuit Judges.

PER CURIAM: Appellant and intervenor are mutually exclusive applicants for a television license in Shreveport, Louisiana. After comparative hearing, the Commission concluded the applicants were equal "in most respects," and based the award to intervenor on its "clear superiority" in two areas: management-ownership integration, and diversification of control of the media of mass communication.

Appellant contends we should reverse the award because the Commission committed procedural errors amounting to a denial of due process and because it decided incorrectly on the merits. We find no denial of due process, nor can we say that the award was unsupported by substantial evidence in the record.

Affirmed.

Filed May 3, 1956

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1956

No. 12,749

INTERNATIONAL BROADCASTING CORPORATION, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,

KTBS, INC., *Intervenor*.

Appeal from a Decision and Order of the
Federal Communications Commission

Before: Bazelon, Fahy and Washington, Circuit Judges.

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered by this Court that the decision and order of the Federal Communications Commission on appeal in this case be, and the same is hereby, affirmed.

Dated: May 3, 1956.

Per Curiam.

Filed May 29, 1956

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1956

No. 12,749

INTERNATIONAL BROADCASTING CORPORATION, *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

KTBS, INC., *Intervenor.*

Before: Edgerton, Chief Judge, Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

Order

Upon consideration of appellant's petition for a rehearing en banc, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Dated: May 29, 1956.

Per Curiam.

Circuit Judge Bazelon did not participate in the foregoing order.

APPENDIX B

The following are the pertinent portions of statutes and regulations relevant to the instant petition.

Section 402(b), (c), (g), (h) and (j) of the Communications Act, 48 Stat. 1093, as amended, 66 Stat. 718, 47 U.S.C. § 402:

"Sec. 402 * * *

"(b) Appeals may be taken from the decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

"(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

" * * *

"(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

" * * *

"(g) At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 10(e) of the Administrative Procedure Act.

" * * *

"(j) The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition

therefor under section 1254 of title 28 of the United States Code, by the appellant, by the Commission, or by an interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section."

Section 405 of the Communications Act, 48 Stat. 1095, as amended, 66 Stat. 720, 47 U.S.C. § 405:

"Sec. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. * * *"

Section 409(b), (c)(2), (c)(3) and (d) of the Communications Act, as amended, 47 U.S.C. § 409:

"Sec. 409 * * *

"(b) The officer or officers conducting a hearing to which subsection (a) applies shall prepare and file an initial decision, except where the hearing officer becomes unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision. In all such cases the Commission shall permit the filing of exceptions to such initial decision by any party to the proceeding and shall, upon request, hear oral argument on such exceptions before the entry of any final decision, order, or requirement. All decisions, including the initial decision, shall become a part of the record and shall include a statement of (1) findings and conclusions, as well as the basis therefor, upon all material issues

of fact, law, or discretion, presented on the record; and (2) the appropriate decision, order, or requirement.

"* * *

"(c)(2) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no person who has participated in the presentation or preparation for presentation of such case before an examiner or examiners or the Commission, and no member of the Office of the General Counsel, the Office of the Chief Engineer, or the Office of the Chief Accountant shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case, unless upon notice and opportunity for all parties to participate.

"(c)(3) No person or persons engaged in the performance of investigative or prosecuting functions for the Commission, or in any litigation before any court in any case arising under this Act, shall advise, consult, or participate in any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, except as a witness or counsel in public proceedings.

"(d) To the extent that the foregoing provisions of this section are in conflict with provisions of the Administrative Procedure Act, such provisions of this section shall be held to supersede and modify the provisions of the Act."

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009:

"Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.—(a) Right of Review.—

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"* * *

"(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of §§ 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Section 1.854(a) of the Rules and Regulations of the Federal Communications Commission. 15 F.R. 2198, April 19, 1950, 47 C.F.R. 1.854.

§1.854. *Exceptions; oral arguments.* (a) Each exception to an initial decision or to any part of the record or proceeding in any case, including rules upon

motions or objections, shall point out with particularity alleged errors in the decision or ruling and shall contain specific references to the page or pages of the transcript of hearing, exhibit or order on which the exception is based. Any objection not saved by exception, filed pursuant to this section, is waived. The exceptions should be concise and they will not be accepted if they contain argumentative matters or discussions of law. Excerpts of testimony, as may be desired, must not be contained in the exceptions but they may be set forth in an appendix to a brief or memorandum of law filed in accordance with paragraph (c) of this section.